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No. 89-1091

Supreme Court, U.S.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

THOMAS SOBOL, as Commissioner of the
New York State Education Department,

Petitioner,

— against —

CLIFFORD BURR, by his Parents and Next Friends,
KENNETH BURR, BETTY BURR,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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Respondent urges the Court to deny the petition for certiorari because the action is moot, stating that Clifford Burr will complete the year of compensatory education before the Court can resolve the merits of the petition. Respondent cites *DeFunis v. Odegaard*, 416 U.S. 312 (1974) in support of his argument. Respondent's Brief in Opposition at 9, 10. The action is not moot because a decision in petitioner's favor, whether after summary or plenary consideration by the Court, would enable petitioner to shift the cost of Clifford Burr's education at the Institute for the summer of 1989 and the 1989-90 school year from the State to either the Institute or the Burrs. In addition, the question presented by this petition is not a question of admission to

a school as in *DeFunis v. Odegaard*, 416 U.S. at 314. The Commissioner upheld the decision of the Hearing Officer on Clifford's attendance at the Institute. The question of admission to the Institute was never an issue in this litigation because, as the district court held, respondent was not aggrieved by that decision and did not seek federal court review of that aspect of the decision. S. App. at 30a.

Rather, the question raised by the petition is whether the Second Circuit's judgment requiring the State to fund an additional year of education for Clifford at the Institute after the age of 21 because of past procedural violations violates the eleventh amendment. If it does, then the State cannot be required to pay for respondent's tuition at the Institute and can recover it from the Institute or the Burrs. The Commissioner has not appointed Clifford to the Institute for the summer of 1989 or for the academic year 1989-90. Appointment by the Commissioner is required for public funding of a pupil's tuition at the Institute. N.Y. Educ Law §§ 4206, 4207(4). Thus, a reversal of the judgment below will leave no authority for public funding of Clifford's education at the Institute for that time period for which he was not appointed. Clifford will be in the position of private pupils not appointed by the Commissioner to the Institute who pay tuition directly to the Institute. There will be no authority for public funding of his tuition. Thus, the action is not moot.

Nonetheless, if the Court does decide that this action is moot, it should not deny the petition for certiorari, as respondent urges. Rather, it should follow the general practice of this Court for dealing with a case which has become moot on its way to the Court, namely, grant the petition for certiorari, and vacate the judgment below with a direction to dismiss the action as moot. Such action eliminates the *res judicata* effect of a decision which has become unreviewable. *United States v. Munsingwear*, 340 U.S. 36 at 39 and n.2 (collecting cases) (1950); *United States v. W.T. Grant Co.*, 345 U.S. 629, 632 (1950); see *DeFunis v. Odegaard*, 416 U.S. at 320; Supreme Court Practice, R. Stern, E. Gressman, S. Shapiro, §§ 5.13, 18.5 (6th ed. 1986).

CONCLUSION

FOR THE FOREGOING REASONS, THE COURT
SHOULD GRANT THE PETITION AND REVERSE
THE JUDGMENT OF THE SECOND CIRCUIT.

Dated: New York, New York
February 12, 1990

Respectfully submitted,

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